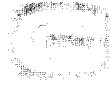


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**COMCAST
CORPORATION**

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May 12, 1998

Ex Parte

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Ms. Magalie R. Salas
Secretary
Federal Communications Commission
1919 M Street, N.W., Room 222
Washington, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Re: Federal-State Joint Board on Universal Service
CC Docket No. 96-45

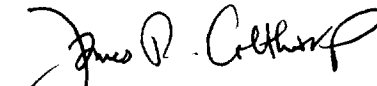
Dear Ms. Salas:

On May 11th 1998, James Coltharp of Comcast Corporation met with Ruth Milkman, Deputy Bureau Chief, as well as Valerie Yates and Lori Wright of the Common Carrier Bureau to discuss issues in the above referenced proceeding. We discussed the need for prompt action by the Commission to provide a definitive and consistent mechanism for calculating "interstate" end user revenues for Universal Service contributions. Comcast also raised issues identified in the attached handout.

In addition, Comcast files for the record in this proceeding a legal memorandum from Cole Raywid & Braverman that discusses the Commission's legal authority to issue an interpretive rule clarifying these questions without additional notice and comment.

Please contact the undersigned for any questions.

Sincerely,


James R. Coltharp

CC: Ruth Milkman
Valerie Yates
Lori Wright

Attachments:

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COMCAST CORPORATION

Determining "Interstate" Wireless Revenues for Universal Service Contributions

Timing

The Commission should provide guidance on a definitive and consistent mechanism for estimates of "interstate" end user revenues by wireless carriers as soon as possible.

Wireless carriers applying a wide range of "good faith" estimates have been operating amid confusion and competitive disparities since September 1997. The current processes of estimating "interstate" revenues and of using varying approaches to derive "end user" revenues are neither fair nor competitively neutral with respect to wireless carriers. Absent conclusive guidance from the Commission, customers will continue to confront wide variation in billing practices among different industry segments, and among carriers within a specific industry segment, which inevitably causes substantial, albeit unintended, customer confusion and competitive disadvantages. This confusion and uncertainty will only serve to undermine the legitimate effort to advance universal service.

The Commission should provide guidance, at least by adopting an interim mechanism, without allowing for the delays resulting from seeking notice and comment. The Commission (or the Common Carrier Bureau) has authority to establish a definitive and consistent mechanism through Public Notice.

Methodology and Proxies

The Commission's next step must be to promote accurate revenue reporting without imposing the burdens of excessively detailed cost and revenue reports on carriers or the Commission.

The Commission may desire to establish (1) a fixed charge, or (2) a definitive methodology by which wireless carriers estimate "interstate" revenues, beginning with the use of a common market definition, appropriate time periods for forming estimates, and assumptions related to traffic patterns. In addition, the Commission will need to establish a definitive methodology by which wireless carriers not subject to the Uniform System of Accounts will derive "end user" revenues in the context of industry practices of bundling service with CPE and features.

Due to the immediate need for guidance, the FCC should provide an interim measure, select a reasonable proxy based on the universe of (wireless) interstate estimates already submitted by carriers. As necessary, carriers could seek waivers of the proxy allowing for a presumption of reasonableness based on a showing of unique market attributes.

The FCC could establish a single proxy or a choice of proxies depending on whether the Commission seeks to distinguish different MTA characteristics – however, carriers must not be permitted to average values for diverse markets or MTAs in order to artificially reduce their universal service contribution. Accordingly, as an interim mechanism, the FCC might choose either:

- (1) A single proxy with an allowance for waivers to make appropriate distinctions, because a larger group of carriers may find that the single proxy does not fit their market conditions; or,
- (2) Two or more proxies to distinguish market characteristics (e.g., Washington, D.C. and Lubbock, Texas are likely to have very different interstate traffic patterns). Even with multiple proxies, the FCC might still retain an allowance for waivers, or might simply conclude that the choice of proxies provides the necessary distinctions among markets without imposing processing burdens on the agency.

While it is important to make an informed choice among these methodologies, time is of the essence—because the status quo perpetuates confusion, uncertainty, and competitive unfairness.

The Commission also should avoid excessive and unnecessary reporting burdens on carriers that lack the resources or the established, compatible accounting procedures (e.g., a Uniform System of Accounts) of incumbent LECs or large IXC's to respond to highly detailed reporting requirements.

Establishing a "True Up"

The Commission should develop a simple framework for a "true-up" to adjust for carriers that have overestimated and overpaid contributions relative to their competitors.

Once it has established a proxy, the Commission should move ahead to "true up" past assessments. In conjunction with the interim proxy, the FCC should announce a review of the various methodologies adopted by wireless carriers on FCC Form 457, and provide a mechanism to "true up" past assessments.

A true up mechanism could simply calculate the value of the difference between a carrier's overestimated contribution to USF as compared to the amount that would have been assessed using the adopted interim approach. For ease of administration, the value of the true up could be applied as a credit toward future contributions until the credit is exhausted.

Nonetheless, the considerable time expired since the implementation of Form 457 and the significant disparities among contributions by carriers operating in similar, competitive markets warrant action to ease the confusion and address unintended competitive disparities in the wireless marketplace.

COLE, RAYWID & BRAVERMAN, L.L.P.

ATTORNEYS AT LAW

SECOND FLOOR

1919 PENNSYLVANIA AVENUE, N.W.

WASHINGTON, D.C. 20006-3458

(202) 659-9750

ALAN RAYWID
(1930-1991)

OF COUNSEL
FRANCES J. CHETWYND

FACSIMILE
(202) 452-0067

INTERNET
WWW.CRBLAW.COM

WRITER'S DIRECT DIAL
(202) 828-9811

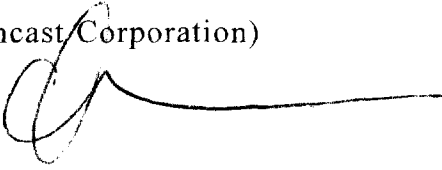
WRITER'S E-MAIL ADDRESS
CSAVERAGE@CRBLAW.COM

JOHN P. COLE, JR.
BURT A. BRAVERMAN
ROBERT L. JAMES
JOHN D. SEIVER
WESLEY R. HEPPLER
PAUL GLIST
DAVID M. SILVERMAN
JAMES F. IRELAND, III
STEVEN J. HORVITZ
CHRISTOPHER W. SAVAGE
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DONNA C. RATTLEY
THOMAS SCOTT THOMPSON
ADAM S. CALDWELL
SANDRA GREINER
JAMES W. TOMLINSON
MARK S. KRISTIANSEN⁺

ADMITTED IN MARYLAND ONLY

MEMORANDUM

To: James R. Coltharp (Comcast Corporation)

From: Christopher W. Savage 

Date: May 12, 1998

Re: **Commission Authority To Modify Form 457 Requirements For CMRS Providers Without Further Notice And Comment**

1. Introduction.

This memorandum was prepared at your request for filing with the Federal Communications Commission (the "Commission") in connection with Commercial Mobile Radio Service ("CMRS") providers' use of Form 457.

On August 15, 1997, the Commission ruled that, on a "interim" basis, universal service fund ("USF") contributors that cannot directly identify interstate revenues must make estimates using a methodology that they in "good faith" believe will produce "reasonably accurate" results.¹ CMRS providers may be using different estimation methods because wireless markets and billing records do not readily identify

¹ Changes to the Board of Directors of the National Exchange Carrier Association, Inc.; Federal-State Joint Board on Universal Service, *Order on Reconsideration, Second Report and Order, and Further Notice of Proposed Rulemaking*, CC Docket Nos. 97-21, 96-45, 12 FCC Rcd 12444 (August 15, 1997) ("*August 15 Order*") at ¶ 21.

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"interstate" traffic. This causes a problem when competing providers use different methods. A responsible provider might reflect higher interstate usage than a provider seeking to minimize contributions. Or, a provider operating in markets with differing interstate usage might use a company-wide average for all markets, which would disadvantage competitors in the markets with high interstate usage.

In order to address this confusion, one of several reasonable methodologies could be applied uniformly by CMRS providers. This situation presents two questions:

1. May the Commission require CMRS providers to use a specified methodology without further "notice and comment" proceedings?
2. If so, may the Commission apply the more specific requirement to Forms 457 (the USF estimated contribution forms) that have already been filed?

The answer to both questions is "yes."

2. Clarifying The Application Of Form 457 To CMRS Providers Would Be An Interpretive Rule, Exempt From Notice-And-Comment Requirements.

Under the *August 15 Order*, a contributor's interstate revenue figure must be derived directly from the contributor's books or estimated using a methodology that will produce "reasonably accurate" results. This substantive rule would not change by virtue of the Commission providing guidance to the CMRS industry about how to make such estimates. As a result, such guidance would be an interpretive rule — expressly exempt from "notice and comment" requirements.²

The language used to establish the current requirement supports this view. A contributor's methodology must be one that it "in good faith, believe[s] will yield a *reasonably accurate result*." Existing telecommunications firms such as CMRS providers — which operate under unique market characteristics not shared by landline telephone

² The line between an "interpretive" rule and a "substantive" rule is not always clear. The basic idea, however, is that interpretive rules resolve ambiguity in, clarify, or explain an existing rule, but do not change policy. As one court put it, "interpretive rules merely clarify or explain existing law or regulations" and "go to what the administrative officer thinks the statute or regulation means." *August 15 Order* at ¶ 15 n.29, citing *Southern California Edison Co. v. FERC*, 770 F.2d 779, 783 (9th Cir. 1985).

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companies — could fairly be held to a different standard of "reasonable accuracy" than other potential USF contributors, without changing the basic rule.³

It bears emphasis here that the only matter at issue would be clarification of an *estimation* methodology. It is hard to see how clarifying the application of a vaguely stated "good faith/reasonable accuracy" rule for making an estimate could constitute a new "substantive" rule.

3. The Commission May Require Previously-Filed Forms To Be Corrected In Light Of Subsequent Administrative Guidance.

Form 457 on its face contemplates revisions if data need to be corrected. As the Common Carrier Bureau noted in its most recent clarifications of the Form 457 requirements, "a contributor must file a revised Worksheet if it discovers an error in the data that it reports."⁴ This clearly indicates that previously-filed Forms 457 are to be re-submitted with correct information.

Certain features of the *August 15 Order* also show that subsequent adjustments are contemplated. That order required contributors that base their interstate revenue figures on estimates to "document how they calculated their estimates and make such information available to the Commission or Administrator upon request."⁵ Moreover, the new Form 457 instructions refer to the possibility of an audit of a Form 457.⁶ Audits would be pointless if corrections based on the audit were not possible.

³ The Commission could conclude that, for a CMRS provider to have a "good faith belief" that a particular estimation method will produce a "reasonably accurate result," the CMRS provider must follow certain basic steps that the Commission itself may specify. The Commission also could establish interim estimates, or proxies, until those basic steps are developed and adopted.

⁴ See Public Notice, DA 98-329, "Division Announces Release of Revised Universal Service Worksheet, FCC Form 457, CC Docket Nos. 97-21, 96-45" (March 4, 1998) at 11 ("Public Notice").

⁵ *August 15 Order* at ¶ 21. This requirement contemplates that an "estimate" may be subject to later revision if it turns out to be wrong based upon review of the underlying data. Similarly, on page 17 of its revised instructions for Form 457, the Bureau directs that "[a]ll information supporting special studies must be made available to either the FCC or to the Universal Service Administrator upon request."

⁶ *Public Notice* at 11.

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Moreover, in the *August 15 Order*, the Commission stated that the approach it was setting out was an "interim" one. The Commission has indicated in other contexts that designating a mechanism as "interim" — which it plainly did with the "good faith estimate/reasonable accuracy" rule — "put[s] carriers on notice" that adjustments may be made that relate back to filings under the "interim" regime.⁷

In these circumstances, CMRS providers cannot reasonably expect that — no matter what figures they may have included in the Form 457 regarding interstate revenues based on the "interim" approach — they would never have to file a revised form that corrects information relating to the period for which the revision was necessary. It follows that an interpretive rule clarifying the revenue estimation methodology to be used by CMRS providers can be applied to already-filed Forms 457.

4. The Common Carrier Bureau May Take The Requisite Actions.

Finally, as an administrative matter, the Common Carrier Bureau, rather than to the Commission itself, could issue the required clarification. Section 0.91 of the Commission's rules broadly defines the scope of the functions of the Bureau, and Section 0.291 delegates the performance of all of those functions the Bureau Chief, subject to various exemptions not relevant in the case of interpretive rules.⁸

In fact, in issuing and then revising instructions for filling out Form 457 without engaging in any notice-and-comment process, the Bureau has already engaged in "interpretive rulemaking" regarding USF contributions. If the Bureau, rather than the Commission, may provide instructions and guidance of the type included in its most recent revisions of the Form 457 instructions, then it can issue an interpretive rule regarding the appropriate estimation of "interstate" revenues for CMRS providers as well.

⁷ See *Price Cap Performance Review for Local Exchange Carriers, Fourth Report and Order in CC Docket No. 94-1 and Second Report and Order in CC Docket No. 96-262*, 12 FCC Rcd 16642 (1997) at ¶179 ("*Price Cap Fourth R&O*").

⁸ The Commission has previously upheld the Common Carrier Bureau as acting within its delegated authority in issuing "interpretations" of existing Commission rules and policies. See, e.g., *Southwestern Bell Telephone Company. Application for Review of Memorandum Opinion and Order Concerning Proper Treatment of Affiliate Transactions, Order on Review*, 12 FCC Rcd 2697 (1997) at ¶ 14.